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7 UNITED STATES DISTRICT COURT  
8 NORTHERN DISTRICT OF CALIFORNIA  
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10 MARWAN AHMED HARARA, )  
11 Plaintiff, )  
12 v. )  
13 CONOCOPHILLIPS COMPANY, et )  
14 al., )  
15 Defendants. )  
\_\_\_\_\_ )

No. C04-0515 BZ

**ORDER ON CROSS MOTIONS  
FOR SUMMARY JUDGMENT ON  
COUNTERCLAIMS**

16 CONOCOPHILLIPS COMPANY, )  
17 Counterclaimaint, )  
18 v. )  
19 MARWAN AHMED HARARA. )  
20 Counterdefendant. )  
\_\_\_\_\_ )

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22 Now before me are the parties cross-motions for  
23 summary judgment on the counterclaims of defendant and  
24 counterclaimant ConocoPhillips Company ("Conoco") against  
25 plaintiff and counterdefendant Marwan Ahmed Harara.<sup>1</sup>  
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27 <sup>1</sup> The facts are set forth in my April 29, 2005 Order  
28 on Cross Motions for Summary Judgment on Plaintiff's Claims.  
This order relies on evidence admitted in according with my  
ruling on defendant's evidentiary objections, which will be

1 Conoco's first counterclaim seeks relief for breach of  
2 contract for Harara's failure to pay in full for a January  
3 6, 2004 delivery of gasoline and for defaulting on his  
4 January and February 2004 rent. To prevail on a claim for  
5 breach of contract, Conoco must establish (1) the existence  
6 of a valid contract (2) Conoco's performance or excuse for  
7 nonperformance, (3) Harara's breach, and (4) resulting  
8 damages. See Reichert v. General Ins. Co., 68 Cal. 2d 822,  
9 830 (1968); Armstrong Petroleum Corp. v. Tri-Valley Oil &  
10 Gas Co., 116 Cal. App. 4th 1375, 1391 (2004); 4 Witkin,  
11 California Procedure, Pleading § 476 (4th ed. 1997); 1  
12 Witkin, Summary of California Law, Contracts § 791 (9th ed.  
13 1990). Based on the evidence submitted, Conoco has  
14 established that no genuine issue of material fact exists  
15 as to whether Harara breached the Franchise Agreement. See  
16 Fed. R. Civ. P. 56; Rand v. Rowland, 154 F.3d 952, 963 (9th  
17 Cir. 1998).

18 On January 16, 2001, Harara and Tosco Marketing  
19 Company, Conoco's predecessor in interest, entered into the  
20 Dealer Station Lease and Motor Fuel Supply Agreement (the  
21 "Franchise Agreement") that expired on April 30, 2004. See  
22 Decl. of Dean Masterton in Supp. of Conoco's Mot. for Summ.  
23 J. or, in the Alternative, Summ. Adjudication as to Pl.'s  
24 Claims ("Masterton Decl."), Ex. A. Section 16(a) of the  
25 Franchise Agreement provides that Harara "shall pay for all  
26 motor fuel purchased from [Conoco] according to the terms

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issued separately.

1 established from time to time by [Conoco's] Credit  
2 Department." Id. In approximately June 2002, Conoco  
3 placed Harara on "Cash in Advance" status, which required  
4 him to prepay for all gasoline deliveries. Decl. of Paul  
5 Curtis in Supp. of Conoco's Mot. for Summ. J. or, in the  
6 Alternative, Summ. Adjudication as to Pl.'s Claims ("Curtis  
7 Decl.") ¶ 6. On January 6, 2004, Conoco delivered a  
8 shipment of gasoline to the Station after its Credit  
9 Department authorized a one-time gasoline delivery without  
10 prepayment.<sup>2</sup> Curtis Decl. ¶ 6. The cost of the shipment  
11 totaled \$14,310.82. Id. Conoco credited Harara with  
12 \$5,449.59 owed him for recent credit card sales at the  
13 Station leaving \$8,861.23 due on January 7, 2004. Conoco  
14 is still owed that amount. Curtis Decl. ¶ 6. Conoco has  
15 established that Harara failed to pay this amount, and  
16 Harara has not demonstrated that he paid this amount or  
17 that he was not required to do so under the Franchise  
18 Agreement. See id. I find that based on the evidence  
19 submitted, Conoco has established that Harara breached  
20 section 16 of the Franchise Agreement by failing to pay in  
21 full for the January 6, 2004 gasoline delivery, and Conoco  
22 is therefore entitled to judgment as a matter of law.

23 Conoco has also established that no genuine issue of  
24 \_\_\_\_\_

25 <sup>2</sup> Harara generally contends that Conoco refused to  
26 permit him to place an order for gasoline unless cash  
27 payments were sent and verified in advance. See Decl. of  
28 Marwan Ahmed Harara in Opp. to Conoco's Motion for Summ. J.  
as to its Counterclaims ("Harara Opp. Decl.") ¶ 11.  
However, Conoco has demonstrated, and plaintiff does not  
dispute, that it did not require payment in advance for the  
January 6, 2004 delivery. See Curtis Decl. ¶ 6.

1 material fact exists as to whether Harara defaulted on his  
2 January and February 2004 rent. Section 3 of the Franchise  
3 Agreement required Harara to pay monthly rent.

4 See Masterton Decl., Ex. A. Conoco has shown that Harara  
5 owed \$11,606.78 in rent for January and February 2004, and  
6 that he failed to pay this amount. See Curtis Decl. ¶ 8.

7 Harara does not dispute that he owed Conoco rent for  
8 January 2004, but contends that he paid it. Specifically,  
9 he argues that Conoco refused to deliver gasoline to the  
10 Station until he had fully paid his account balance. Since  
11 Conoco delivered a shipment of gasoline to the Station on  
12 January 6, 2004, he requests that I infer that he paid  
13 his January 2004 rent. However, according to the terms of  
14 the Franchise Agreement, his January 2004 rent was not due  
15 until January 31, 2004 well after Conoco made the January  
16 6, 2004 delivery. See Masterton Decl., Ex. A, § 3.

17 Conoco's shipment of gasoline on January 6, 2004 occurred  
18 well before Harara's rent became due. Harara also relies  
19 on a statement in his declaration that "Conoco's credit  
20 department forced Harara to pay rent at the beginning of  
21 the month and not at its end. Harara paid rent at the  
22 beginning of the month using advanced cash funds."

23 See Decl. of Marwan A. Harara in Supp. of his Rep. to  
24 Conoco's Opp. to his Summ. J. Mot. at 2. Accepting this  
25 statement as true, it demonstrates that Harara paid rent at  
26 the beginning of the month; it does not establish that  
27 Harara paid his January 2004 rent. At the hearing, I asked  
28 Harara whether he paid his January 2004 rent. While he

1 claimed that he had paid it, he was unable to provide any  
2 evidentiary support other than the above statement in his  
3 declaration. See id.

4 Harara does not dispute that he failed to pay rent for  
5 February 2004. He contends instead that Conoco's Notice of  
6 Termination either relieved or suspended his duty to pay  
7 rent. Masterton Decl. ¶ 14, Ex. D. Conoco's Notice of  
8 Termination provided that the Franchise Agreement "shall  
9 terminate at noon on March 1, 2004," and it did not require  
10 him to surrender the Station on that date. See id. Harara  
11 has offered no authority to support his argument that the  
12 Franchise Agreement did not require him to pay rent through  
13 February 2004. See id. Even if I were to accept Harara's  
14 argument, he would have still owed rent for the time period  
15 preceding February 20, 2004, the date of Conoco's Notice of  
16 Termination. See id. For the foregoing reasons, Conoco's  
17 motion for summary judgment as to its first counterclaim is  
18 **GRANTED**, and Harara's motion is **DENIED**.

19 Based on its first counterclaim, Conoco has  
20 established that it is entitled to \$16,663.83 in damages.<sup>3</sup>  
21 While Harara claims that he paid a \$15,000 security deposit  
22 to Conoco, Conoco applied \$10,000 of the deposit toward  
23 Harara's past debts on November 13, 2002. See Rep. Decl.  
24 of Paul Curtis in Supp. of Conoco's Mot. for Summ. J., or  
25 in the Alternative, S. Adjudication as to Pl.'s Claims  
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28 <sup>3</sup> This amount includes several hundred dollars in  
miscellaneous charges, such as credit card fees, which  
plaintiff did not contest. See Curtis Decl. ¶ 8.

1 ("Curtis Rep. Decl.") ¶ 2. On September 9, 2004, Conoco  
2 deducted the remaining \$5,000 from the amount owed on  
3 Harara's account. Id. A total of \$16,663.83 remains due  
4 on Harara's account, which Conoco has demonstrated Harara  
5 failed to pay. Curtis Decl. ¶ 8.

6 As I have granted Conoco summary judgment on its first  
7 counterclaim, I need not decide whether Harara is also  
8 liable for the same amount under Conoco's second  
9 counterclaim for violating section 2709 of the California  
10 Commercial Code.

11 Conoco's third through fifth counterclaims are based  
12 on the Settlement Agreement entered into by Conoco, the  
13 City of Oakland, and Khalid Usman in July 2004. See Decl.  
14 of Douglas Bergman in Supp. of Def. and Counterclaimant  
15 Conoco's Mot. for Summ. J. or, in the Alternative, Summ.  
16 Adjudication as to Pl.'s Claims ("Bergman Decl."), Ex. B.  
17 The Settlement Agreement required Conoco to pay the City of  
18 Oakland \$4,658.98, plus \$2,209.75 in attorney's fees, and  
19 to establish a \$50,000 fund in the name of Khalid Usman to  
20 provide financial assistance to implement additional  
21 abatement measures, as needed, until the expiration of the  
22 settlement agreement in July 2005. See id. Conoco argues  
23 that it is entitled to the \$56,868.73 on three separate  
24 basis: express indemnity, equitable indemnity, and  
25 negligence.

26 Based on the evidence presented, I find that issues of  
27 material fact remain in dispute with regard to each of  
28 these counterclaims. In particular, the parties dispute

1 the events which gave rise to the Settlement Agreement, and  
2 whether these events occurred during the term of the  
3 Franchise Agreement. They also dispute whether the City of  
4 Oakland or the Oakland Police Department required Harara to  
5 take specific measures or make structural improvements to  
6 the Station to curb the spread of illegal activity; what  
7 measures Harara actually took; and whether these measures  
8 adequately addressed any problems occurring at the Station.  
9 Any unspent remainder of the \$50,000 will be returned to  
10 Conoco upon expiration of the Settlement Agreement, and  
11 Conoco has not established, nor could it explain at the  
12 hearing how much of this fund remains. See Bergman Decl.,  
13 Ex. B. In addition to the above issues, the parties  
14 dispute a number of other facts that are material to these  
15 counterclaims. Accordingly, both parties' motions for  
16 summary judgment on Conoco's third through fifth  
17 counterclaims are **DENIED**.

18 For the foregoing reasons, Conoco's motion for summary  
19 judgment is **GRANTED** in the amount of \$16,663.83. The third  
20 through fifth counterclaims will proceed to trial as  
21 scheduled.

22 Dated: April 29, 2005

23 /s/Bernard Zimmerman  
24 Bernard Zimmerman  
25 United States Magistrate Judge  
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